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CASE CLIPS

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CRIMINAL LAW ISSUES

McCANN v. STATE, No. 49S05-0104-CR-209, ___ N.E.2d ___ (Ind. June 20, 2001).
BOEHM, J.

We hold that the pregnancy of a victim, like any other circumstance that may extend the harm inflicted by a crime, may be an aggravating circumstance in sentencing whether or not the perpetrator is aware that the victim is pregnant.

. . . .

We disagree with the Court of Appeals [McCann v. State, 742 N.E.2d 998 (Ind. Ct. App. 2001)] that the trial court's consideration of the nature and circumstances of the crime was improper. . . . [T]he Court of Appeals held that A.L.'s pregnancy, because it was "a fact apparently unknown to McCann," was not a proper aggravating circumstance.

. . . .

We agree with Judge Vaidik that pregnancy is similar to the infirmity or age of the victim in that the defendant's knowledge of these circumstances is not necessary for them to qualify as aggravating. [Citation omitted.] To be sure, knowledge of the victim's vulnerability adds to the culpability of the perpetrator, but aggravating circumstances turn on the consequences to the victim as well as the culpability of the defendant. [Citation omitted.] This understanding of aggravating circumstances comports with the Black's Law Dictionary definition of aggravation: "[a]ny circumstance attending the commission of a crime . . . which increases its guilt or enormity or adds to its injurious consequences . . . ." Black's Law Dictionary 60 (5th ed. 1979).

. . . .

SHEPARD, C. J., and DICKSON and RUCKER, JJ., concurred.
SULLIVAN, J., concurred as to Part I and dissented as to Part II, without filing a separate written opinion.

WRAY, v. STATE, No. 54A01-0012-CR-432, ___ N.E.2d ___ (Ind. Ct. App. June 14, 2001).
BARNES, J.

At a bench trial, when the State sought to introduce Edwards' breath test operator recertification into evidence, the following colloquy between defense counsel and Edwards took place:

Q: Officer, do you receive training in pharmacology of alcohol?
A: No, I do not.

Q: Do you receive training in the theory of operation of breath test equipment?

A: No, sir.

Q: How about in the care and maintenance of breath test equipment?

A: No, sir. In fact, we were instructed during the class that if that comes up in court that it would be recommended that a certified instrument maintenance officer or person be subpoenaed to court. We are only trained on how to give to [sic] test.

Q: Have you received training in the legal aspects of breath testing?

A: No.

. . .

[Citation to Record omitted.] The trial court overruled defense counsel's subsequent hearsay objection to the introduction of the department of toxicology's recertification letter for Officer Edwards. Wray was found not guilty of operating while intoxicated, but guilty of operating with 0.10% of alcohol in his breath or blood. . . .

. . . .

Indiana Evidence Rule 803(8) provides in part that the following is not excluded by the hearsay rule:

> Unless the sources of information or other circumstances indicate lack of trustworthiness, records, reports, statements, or data compilations in any form, of a public office or agency, setting forth its regularly conducted and regularly recorded activities . . . .

Indiana Code Section 9-30-6-5 provides in part:

> (a) The director of the department of toxicology of the Indiana University school of medicine shall adopt rules under IC 4-22-2 concerning the following:
>
> (1) Standards and regulations for the:
>
> (A) selection;
> (B) training; and
> (C) certification;
>
> of breath test operators.
>
> * * * * *
>
> (c) Certified copies of certificates issued in accordance with rules adopted under subsection (a):
>
> (1) are admissible in a proceeding under this chapter, IC 9-30-6-5, or IC 9-30-9; . . . and
>
> * * * * *
>
> (4) constitute prima facie evidence that the breath test operator was certified by the department of toxicology on the date specified on the certificate.

(d) Results of chemical tests that involve an analysis of a person's breath are not admissible in a proceeding under this chapter, IC 9-30-5, or IC 9-30-9 if:

(1) the test operator . . .

[has] not been approved in accordance with the rules adopted under subsection (a).

. . . Finally, the rules promulgated by the department of toxicology pursuant to the above statute provide in part:

(a) Any person to be certified as a breath test operator analyzing breath for ethanol must attend a course in the theory and operation of test devices approved by the director of the state department of toxicology.

(b) Such a course shall include a minimum of twenty (20) hours of instruction.

(c) Such instruction shall be devoted to lectures, laboratory training, and demonstrations in accordance with the following:

(1) The pharmacology of alcohol.

(2) The theory, operation, and care of the breath test equipment.

(3) The legal aspects of breath testing for ethanol.

(4) The interpretation of breath test results.

. . .

260 Ind.Admin. Code § 1.1-1-2 (emphases added)

At trial, Wray claimed the department of toxicology's letter was untrustworthy, and therefore did not fall under the public records hearsay exception, because it states that Officer Edwards was a certified breath test operator "[p]ursuant to the authority granted by IC 9-30-6-5 (1991), and the regulations promulgated thereto, 260 IAC 1.1 . . . .," record p. 154 (emphasis added), yet Officer Edwards unequivocally testified that he had not received training in four of the five areas that the regulations require breath test operators to receive: the pharmacology of alcohol, the theory and care of breath test equipment, the legal aspects of breath testing, and the interpretation of test results. [Footnote omited.]

. . . .

Our legislature delegated responsibility for setting standards for the training of breath test operators to the department of toxicology, which possesses expertise in this area. We assume that in promulgating Section 1.1-1-2 of Title 260 of the Indiana Administrative Code, the department set forth the training that it believes breath test operators should receive before they can be considered certified and, therefore, before the results of tests that they administer may be admitted into evidence in a criminal drunk driving proceeding. We will not second-guess these training rules and whether training in all five of the specified areas are truly required. . . . . . [W]e must hold that where, as here, there is uncontradicted evidence that a "certified" breath test operator was in fact not trained in accordance with the department of toxicology's regulations regarding training, a breath test operator certificate that indicates otherwise is not admissible under Indiana Code Section 9-30-6-5(c).

. . . .

DARDEN and NAJAM, JJ., concurred.

TRAMMELL v. STATE, No. 82A01-0012-CR-418, ___ N.E.2d ___ (Ind. Ct. App. June 18, 2001).

BROOK, J.

Appellant-defendant Kristie L. Trammell ("Trammell") appeals her conviction for neglect of a dependent [footnote omitted] as a Class B felony. We affirm and remand.

. . . .

. . . Finally, Trammell challenges the trial court's order that she not become pregnant as a condition of probation.[7] . . .

Trammell's claim raises an issue of first impression in Indiana. . . .

The trial court's order that Trammell not become pregnant while on probation was apparently intended to "protect the public by preventing injury to an unborn child," but it serves no rehabilitative purpose whatsoever. *People v. Pointer*, 199 Cal. Rptr. 357, 365 (Cal. Ct. App. 1984) (defendant, who adhered to and imposed on her children a strict macrobiotic diet, was convicted of child endangerment and ordered not to conceive during five-year probationary period). Indeed, it does nothing to improve her parenting skills or educate her regarding perinatal care or child nutrition and development should she choose to become pregnant after her probationary period expires or even happen to become pregnant while on probation. [Footnote omitted.] We find the *Pointer* court's comments on this issue to be instructive:

> We believe this salutary purpose [of preventing injury to an unborn child] can adequately be served by alternative restrictions less subversive of appellant's fundamental right to procreate. Such less onerous conditions might include, for example, the requirement that appellant periodically submit to pregnancy testing; and that upon becoming pregnant she be required to follow an intensive prenatal and neonatal treatment program monitored by both the probation officer and by a supervising physician. If appellant bears a child during the period of probation it can be removed from her custody and placed in foster care, as was done with appellant's existing children, if the court then considers such action necessary to protect the infant.

[Citation omitted.] [Footnote omitted.] These significantly less intrusive means of protecting an unborn child offer a decisively more reasonable balance of the rehabilitative, constitutional, and law enforcement factors outlined above.

With respect to the intrusiveness of the no-pregnancy condition on Trammell's privacy rights, we refer to *Carey v. Population Servs., Int'l*, 431 U.S. 678 (1977), where the United States Supreme Court considered individual privacy rights in the context of restrictions on the distribution, sale, and advertising of contraceptives:

> . . . .
> The decision whether or not to beget or bear a child is at the very heart of this cluster of constitutionally protected choices. . . . "If the right of privacy means anything, it is the right of the individual, married or single, to be free of unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."

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[7] In sentencing Trammell, the trial court stated,

> The Court feels that it is important that you not bear any other children. You have established now twice you have been convicted of abusing your own children. One of those instances of abuse has lead [*sic*] to a child's death. You struggle with an awful lot of difficulties by your own admission in dealing with the children. And so it will be the order of the Court as a part of your probation that you are not to become pregnant.

Id. at 684-85 (citations omitted). *See also State v. Mosburg*, 768 P.2d 313 (Kan. Ct. App. 1989) (defendant pleaded no contest to endangering a child and was ordered not to become pregnant during two-year parole; court cited *Carey*, *inter alia*, and struck down condition as "unduly intru[sive]" of defendant's right to privacy: "There would be significant enforcement problems should Mosburg become pregnant, forcing her to choose among concealing the pregnancy (thus denying her child adequate medical care), abortion, or incarceration. The State should not have the power to penalize Mosburg if she uses contraceptives which for some reason fail to prevent pregnancy.").

We find the *Mosburg* court's reasoning to be persuasive here. We do not fault the trial court for attempting to prevent a similar tragedy from occurring in the future, especially in light of Trammell's criminal history, demonstrably poor parenting skills, and apparently unsuccessful involvement with social service agencies. Nevertheless, we conclude that ordering Trammell not to become pregnant while on probation excessively impinges upon her privacy right of procreation and serves no discernible rehabilitative purpose.

. . . .

ROBB and VAIDIK, JJ., concurred.

TOWNSEND v. STATE, No. 71A04-0012-CR-563, ___ N.E.2d ___ (Ind. Ct. App. June 19, 2001).

KIRSCH, J.

Clarence Batei Townsend appeals his conviction for public indecency, [footnote omitted] a Class A misdemeanor, contending that the evidence was insufficient to support his conviction because, while there was circumstantial evidence that he urinated in a public place, there was neither evidence nor reasonable inference that he showed his penis while doing so. We agree and reverse Townsend's conviction.

. . . Bryant followed Townsend to the rear of the building where he saw Townsend standing with his back to the officer, facing the building with his hands in front of him as if holding something. Startled, Townsend turned around. Bryant saw that Townsend's pants were unzipped, that there was a big wet spot on the front of Townsend's pants, and that a puddle of urine was flowing on the ground away from the building. Bryant also smelled the odor of urine, but did not see Townsend's penis or a stream of urine coming from Townsend. Bryant arrested Townsend.

. . . .

IC 35-45-4-1 states that a person who knowingly or intentionally appears in a public place in a state of nudity commits public indecency and defines nudity as, in operative part, "*the showing* of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering[.]" IC 35-45-4-1(a),(b) (emphasis added). Here, the trial court found that Townsend urinated at the back of the gas station, a public place, and having done so, Townsend necessarily exposed his penis and thereby appeared in a state of nudity in violation of IC 35-45-4-1. We agree with the trial court that Townsend urinated at the rear of the building, a public place. However, under the facts of this case, we find no violation of IC 35-45-4-1.

. . . WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2105 (1967) defines the term "show," *inter alia*, as "to cause or permit to be seen: as to put on view;" WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 1319 (2nd ed. 1970) defines "show" as "to bring or put in sight or view; cause or allow to appear or be seen; make visible; exhibit; display;" and THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1199 (1970) similarly defines "show" as "to cause or allow to be seen or viewed; to display; make

visible." In this case, Townsend did not cause his penis to be seen or otherwise put it on view. . . .

We are not unmindful of the remarks of this court in *Whatley* [*v. State*, 708 N.E.2d 66 (Ind. Ct. App. 1999)], in which we applied the public indecency statute to a man who, while nude, drove his semi-trailer truck on Interstate 65. After pulling his truck into a weigh station, a state police motor carrier inspector discovered the driver's lack of attire. Whatley was subsequently arrested and convicted. In response to Whatley's argument on appeal that he was seen only because of the inspector's command to open his cab door, the court stated: "[I]t is not the observation of his nudity that the statute proscribes. Rather, the prohibition is against [his] appearance in a public place in a state of nudity. The observation is simply evidence of that which occurred." [Citation omitted.] The majority's comments in *Whatley* suggest that because the statute's language does not expressly require that an individual view the nudity, no observation of the nudity is required for commission of the offense. Because we find *Whatley* distinguishable from this case in several respects, we do not find it controlling of our decision here.

. . . Townsend's deliberate walk to the rear of the premises suggests that any momentary display, and we have no evidence that any occurred, was not knowing or intentional. Third, and perhaps most significant, in *Whatley* one or more persons in fact observed the defendant in his nude state. We have no such casualties in this case. . . .

. . . .

SHARPNACK, J., concurred.

MATTINGLY-MAY, J., filed a separate written opinion in which she dissented, in part, as follows:

To the extent the majority's decision requires that someone see the offending body part, the effect of the decision is to prevent any conviction of public indecency based on circumstantial evidence. . . .

. . . .

. . . It is true that the purpose of the public indecency statute is "to protect the non-consenting viewer who might find such a spectacle repugnant." [Citation omitted.] The majority would require that the "non-consenting viewer" have actually seen Townsend's penis before public indecency could have occurred.

Essentially, what the majority has done is answer in the negative the age-old question, "if a tree falls in the forest, and no one is there to hear it, does it make a sound?" I would decline to hold that public urination is acceptable so long as no one views the perpetrator's penis, and I would accordingly affirm Townsend's conviction of public indecency.

CIVIL LAW ISSUE

MATTER OF ESTATE OF SHOAF, No. 41A01-0009-CV-298, ___ N.E.2d ___ (Ind. Ct. App. June 20, 2001).

MATTINGLY-MAY, J.

[T]he question remains whether payment by the surviving spouse of more than half yet substantially less than all of the mortgage debt entitles that spouse to receive contribution from the estate of an entire one-half of the debt based upon the decedent's obligation for that debt. Indiana courts have not yet answered this precise question; thus, we look to reasoning from courts in other jurisdictions for guidance.

In *White v. Parnell*, 397 F.2d 709, (D.C. Cir. 1968), the court explained the theory behind the majority rule allowing at least some contribution under facts such as those in this case:

> Central to the reasoning in most of the cases allowing contribution is a recognition of two settled legal concepts. First, when a husband and wife take by tenancy by the entireties, the interest of each comprehends the entire fee. Thus, when the survivor takes the realty upon the death of his or her mate, there is no conveyance, since the survivor's title already extended to the whole of the property. . . .
>
> The second applicable legal concept, even more elementary than the first, is the severability of the note and the deed. Decedent, in her lifetime, incurred the obligation as a co-principal on the notes, and we can see no reason why her death should change her liability. The deeds of trust were simply the security; the notes themselves were the primary obligation. Decedent could have been sued on the notes at any time there was a default and, if the property were foreclosed and a deficiency existed, she, and on her death her estate, would have been responsible, along with her husband, for the entire amount of the notes as obligee. The notes on the property will have to be paid by the survivor, and it follows that he is entitled to contribution from the estate of the decedent.

[Citation omitted.] [Footnote omitted.] This explanation for the rule allowing contribution provides us with an answer to the question posed in our case, namely what amount of contribution Sharon Shoaf is entitled to receive. Edwin's obligation to pay one-half of the mortgage debt existed prior to his death; that obligation continued to exist after his death due to the possibility of a claim against the estate from the mortgage holder. Whether the mortgage holder made such a claim is immaterial; the estate's underlying obligation to the surviving spouse exists regardless of the filing of a claim. Sharon satisfied the prerequisite established by Indiana caselaw in paying more than one-half of the mortgage debt. She was thus entitled to make a claim against the estate for contribution of Edwin's one-half, and the trial court was correct in granting her request.

. . . .

BAILEY and FRIEDLANDER, JJ., concurred.

JUVENILE LAW ISSUE

KIPP v. WELLS COUNTY DEP'T OF FAMILY AND CHILDREN, No. 90A02-0102-JV-115, ___ N.E.2d ___ (Ind. Ct. App. June 20, 2001).

KIRSCH, J.

In 1997, M.L.K. became the subject of a CHINS petition and was made a ward of the OFC. On July 6, 2000, the OFC filed a motion to Dismiss Proceedings and Terminate Wardship based on M.L.K.'s marriage.

On August 16, 2000, the trial court held a hearing on the motion, including the Kipps' obligation to reimburse the OFC for the amounts it had expended on M.L.K.'s behalf during her wardship. The trial court entered an order terminating the wardship, directing the Kipps to reimburse the OFC for $21,777.44, and determining that the debt was in the nature of support and maintenance and therefore nondischargeable in bankruptcy. . . .

. . . The Kipps first argue that their due process rights were violated because the notice of the wardship termination hearing that they received did not state that the subject of reimbursement of the OFC's expenses would be litigated. . . .

The OFC argues that because the statute [IC 31-40-1-3] directs the trial court to consider the issue of reimbursement at any hearing, the Kipps were on notice that the issue of reimbursement would be litigated. . . .

Although the statute provides for a reimbursement determination at any hearing, we agree with the Kipps that due process requires they receive notice that reimbursement would be litigated at this hearing. The Kipps received notice that the trial court would hold a hearing regarding the OFC's request to terminate the wardship of M.L.K. The apparent reason for the termination was M.L.K.'s emancipation by marriage. Thus, the resolution of the wardship issue had little real impact on the Kipps' rights or obligations. Under the circumstances, the notice of the wardship hearing would not give a reasonable person actual notice that the issue of reimbursement of expenses would be litigated at the hearing. . . .

The Kipps next maintain that the trial court erred in including within its order a statement that the judgment against the Kipps was in the nature of support and therefore nondischargeable in bankruptcy. Federal law governs what constitutes a nondischargeable "maintenance or support" obligation. [Citation omitted.] State courts nonetheless have concurrent jurisdiction to make that determination. [Citation omitted.] . . . Some federal courts have interpreted this provision [11 USCA § 523(a)(5)] as also rendering nondischargeable child support obligations owed to governmental entities for the care that the agencies provided to the children. *See, e.g.*, *In re Canganelli*, 132 B.R. 369 (Bankr. N.D. Ind. 1991); *In re Burton*, 132 B.R. 575 (Bankr. N.D. Ind. 1988). These courts reasoned that although the child support obligation was not paid to the child, it was owed to the child. Therefore, section (a)(5) applied and the debt was nondischargeable. However, the United States Court of Appeals for the Seventh Circuit subsequently decided this issue to the contrary. In *In re Platter*, 140 F.3d 676 (7th Cir. 1998), the Dekalb County Division of Family and Children Services ("DFCS") claimed that Platter's debt for the support of her delinquent child at a residential treatment facility was not dischargeable in bankruptcy. The court examined the statute and noted that the language providing for exceptions from discharge must be construed narrowly "to assure the debtor has an opportunity for a fresh start." *Id.* at 680. The court noted that under the reimbursement statute, Platter owed her debt to the DFCS directly. It therefore concluded that the exception did not apply and stated "[w]e cannot turn a blind eye to the plain language of § 523(a)(5) in an equitably motivated effort to allow DFCS to defray its costs." While commenting that the result was inequitable, it suggested that "[i]f government entities like DFCS do not wish to be left providing room and board to juvenile delinquents without a means of collecting against bankrupt parents, then they may lobby Congress for another amendment to §523(a)(5) or the Indiana legislature for a revision of [the reimbursement statute]." [Citation omitted.]

We find the reasoning of the Seventh Circuit in *Platter* persuasive, and we conclude that any obligation owed by the Kipps to the OFC under the current statutory framework is dischargeable in bankruptcy.

Finally, the Kipps allege that the trial court erred in ordering them to reimburse the OFC for the costs of caring for M.L.K. without first establishing that they were able to pay those amounts. A delinquent child's parents are financially responsible for any services ordered by the court and must reimburse the county unless the court determines that they are unable to pay for them, payment would be an unreasonable hardship on the family, or justice would not be served. *Matter of Garrett*, 631 N.E.2d 11, 13 (Ind. Ct. App. 1994), *trans. denied*. On the other hand, the right to reimbursement is not unlimited, and the juvenile court must comply with the statute. [Citation omitted.]

In *C.K.*, 695 N.E.2d at 601, this court examined the reimbursement provision. In that case, C.K.'s father appealed the trial court's order that he reimburse the county for $52,276, the costs of C.K.'s out-of-home placement in various facilities after he was adjudged to be delinquent. After reviewing the statute and concluding that "the OFC clearly has the right to seek reimbursement by the child's parents for the costs of any services provided to the delinquent child," *id.* at 605, we noted that the OFC's right to do so is not unlimited, and the trial court must comply with the statute's requirements. Because there was no evidence in the record that the trial court inquired into C.K.'s parents' ability to pay $52,276 or whether such an order would serve the interests of justice, we reversed the trial court's order and remanded the matter for reconsideration. . . .

By contrast, in *J.W.*, 697 N.E.2d at 480, a panel of this court held that the inability to pay was an affirmative defense. . . .

While we recognize the logic behind this court's opinion in *J.W.*, we believe that the approach adopted in *C.K.* is more consistent with the legislative purpose in including the ability to pay inquiry in the statute. The importance of an inquiry into the ability to pay is highlighted here, where the trial court heard absolutely no evidence regarding the Kipps' income, assets, or financial status beyond their history of payment of the weekly court-ordered support. Thus, the trial court had no basis for determining whether the Kipps were financially able to pay the judgment.

. . . .

SHARPNACK, C. J., and MATTING-MAY, J., concurred.

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